

Niall P. McCarthy (SBN 160175)
nmccarthy@cpmlegal.com

Justin T. Berger (SBN 250346)
jberger@cpmlegal.com

COTCHETT, PITRE & MCCARTHY
San Francisco Airport Office Center
840 Malcolm Road, Suite 200
Burlingame, CA 94010
Telephone: (650) 697-6000
Facsimile: (650) 697-0577

Brian S. Kabateck (SBN 152054)
bsk@kbklawyers.com
Richard L. Kellner (SBN 171416)
rlk@kbklawyers.com
KABATECK BROWN KELLNER LLP
644 South Figueroa Street
Los Angeles, CA 90017
Telephone: (213) 217-5000
Facsimile: (213) 217-5010

Steven N. Berk (*admitted pro hac vice*)
steven@berklawdc.com
BERK LAW PLLC
1225 15th Street, N.W.
Washington D.C. 20005
Telephone: (202) 232-7550
Facsimile: (202) 232-7556

*Counsel for Plaintiffs and the Settlement Class
and On Behalf of the Proposed Settlement Class*
[Additional Counsel Listed on Signature Page]

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

In Re: HP Inkjet Printer Litigation

Master File No.: C053580 JF (PVT)

**PLAINTIFFS' MOTION FOR
CONSOLIDATION OF CASES FOR
SETTLEMENT PURPOSES AND FOR
PRELIMINARY APPROVAL OF CLASS
ACTION SETTLEMENT**

**MEMORANDUM OF POINTS AND
AUTHORITIES AND SUPPORTING
DECLARATIONS AND EVIDENCE FILED
CONCURRENTLY HEREWITH**

This Document Relates To:
All Actions

Date: October 1, 2010
Time: 9:00 A.M.
Courtroom: 3, 5th Floor
Judge: Hon. Jeremy Fogel

TABLE OF CONTENTS

NOTICE OF MOTION AND MOTION	ivv
MEMORANDUM OF POINTS AND AUTHORITIES	1
I. INTRODUCTION.....	1
II. THE LITIGATION OF THE ACTIONS	4
A. The <i>Ciolino</i> Action.....	5
B. The <i>Rich</i> Action	7
C. The <i>Blennis</i> Action.....	9
III. THE SETTLEMENT NEGOTIATIONS.....	10
A. Injunctive Relief.....	11
B. E-Credits.....	12
C. Other Aspects of the Settlement.....	13
IV. THE CASES SHOULD BE CONSOLIDATED FOR SETTLEMENT PURPOSES.....	14
V. THE COURT SHOULD APPROVE THE PROPOSED SETTLEMENT	15
A. The Proposed Settlement Merits Preliminary Approval	17
B. The Proposed Settlement Class Satisfies the Requirements of Rule 23	18
C. The Court Should Order Dissemination Of The Proposed Class Notice	22
D. The Court Should Set A Schedule For Final Approval.....	24
VI. CONCLUSION	24

TABLE OF AUTHORITIES

Cases

<i>Acosta v. Trans Union</i> , 243 F.R.D. 377 (C.D. Cal. 2007)	16
<i>Amchem Prods. Inc. v. Windsor</i> , 521 U.S. 591 (1997)	18, 21
<i>Armstrong v. Davis</i> , 275 F.3d 849 (9th Cir. 2001).....	20
<i>Blackie v. Barrack</i> , 524 F.2d 891 (9th Cir.1975).....	18, 21
<i>Chun-Hoon v. McKee Foods Corp.</i> , 2009 WL 3349549, at *2 (N.D. Cal. Oct. 15, 2009).....	16
<i>Churchill Village, LLC v. General Electric Co.</i> , 361 F.3d 566 (9th Cir. 2004).....	16
<i>Class Plaintiffs v. City of Seattle</i> , 955 F.2d 1268 (9th Cir. 1992).....	16
<i>De La Fuente v. Stokely- Van Camp, Inc.</i> , 713 F.2d 225 (7th Cir. 1983)	19
<i>Dukes v. Wal-Mart, Inc.</i> , 603 F.3d 571 (9th Cir. 2010)	18, 20
<i>Eisen v. Carlisle and Jacquelin</i> , 417 U.S. 156 (1974)	23
<i>Farinella v. PayPal, Inc.</i> , 611 F. Supp. 2d 250 (E.D.N.Y. 2009).....	23
<i>General Tel Co. v. Falcon</i> , 457 U.S. 147 (1982)	21
<i>Hanlon v. Chrysler Corp.</i> 150 F.3d 1011 (9th Cir. 1998).....	17, 18, 20
<i>Hanon v. Dataproducts Corp.</i> , 976 F.2d 497 (9th Cir. 1992).....	20
<i>In re Corrugated Container Antitrust Litig.</i> , 643 F.2d 195 (5th Cir. 1981).....	16
<i>In re Glassine & Greaseproof Paper Antitrust Litig.</i> , 88 F.R.D. 302 (E.D. Pa. 1980).....	19
<i>In re Grand Theft Auto Video Game Consumer Litig.</i> , 251 F.R.D. 139 (S.D.N.Y. 2008).....	23
<i>In re M.L. Stern Overtime Litig.</i> , 2009 WL 995864, at *3 (S.D. Cal. 2009)	16
<i>In re Pacific Enterprises Securities Litig.</i> , 47 F.3d 373 (9th Cir. 1995)	16
<i>In re United Energy Corp. Solar Power Modules Tax Shelter Investors Securities Litigation</i> , 122 F.R.D. 251 (C.D. Cal. 1988)	20
<i>Rodriguez v. West Publishing Corp.</i> , 563 F.3d 948 (9th Cir. 2009)	17
<i>Rosario v. Livaditis</i> , 963 F.2d 1013 (7th Cir. 1992)	19, 21
<i>Scholes v. Stone, McGuire & Benjamin</i> , 143 F.R.D. 181 (N.D. Ill. 1992).....	20

1	<i>Schwartz v. Harp</i> , 108 F.R.D. 279 (C.D. Cal. 1985)	20
2	<i>Silber v. Mabon</i> , 18 F.3d 1449 (9th Cir. 1994)	23
3	<i>Smith v. University of Washington Law School</i> , 2 F.Supp.2d 1324 (W.D. Wa. 1998)	20
4	<i>Staton v. Boeing Co.</i> , 327 F.3d 938 (9th Cir. 2003)	16
5	<i>Todd v. Retail Concepts, Inc.</i> , No. 07-0788, 2008 WL 3981593, at *2 (M.D. Tenn. Aug. 22, 2008)	
6	23

8 **Statutes**

9	Cal. Bus. & Prof. Code § 17200	5, 7
10	Cal. Bus. & Prof. Code § 17500	5
11	Cal. Civ. Code § 1750	5

13 **Rules**

14	Fed. R. Civ. P. 23	iv, 3, 16, 18, 21, 22, 23
15	Fed. R. Civ. P. 42	iv

18 **Other Authorities**

19	4 Alba Conte & Herbert B. Newberg, <i>Newberg on Class Actions</i> § 11.25 (4th ed. 2002)	16, 22
20	Manual for Complex Litigation, § 21.632	16, 18

NOTICE OF MOTION AND MOTION

TO THE COURT, ALL PARTIES, AND TO THEIR ATTORNEYS OF RECORD
HEREIN:

PLEASE TAKE NOTICE THAT on October 1, 2010, at 9:00 a.m., or as soon thereafter as it may be heard, in Courtroom 3 of the above-entitled Court, Plaintiffs Daniel Feder, Nicklos Ciolino, Carl K. Rich, David Duran, Jackie Blennis, and David Brickner ("Plaintiffs") will, and hereby do, move for an order: (1) consolidating of three separate actions pending before this Court (*In re: HP Inkjet Printer Litigation*, Case No. C05-3580 JF ("*Ciolino*"); *Rich v. Hewlett-Packard Co.*, Case No. C06-03361 JF ("*Rich*"); and *Blennis v. Hewlett-Packard Co.*, Case No. C07-00333 JF ("*Blennis*")) for settlement purposes; (2) granting preliminary approval of the proposed Stipulation of Settlement between them and Defendant Hewlett-Packard Company ("HP"); (3) directing notice to the class; and (3) scheduling a fairness hearing to finally approve the proposed class action settlement following the fairness hearing.

For the reasons set forth in greater detail in the accompanying Memorandum of Points and Authorities, the Court should consolidate the *Ciolino*, *Rich*, and *Blennis* actions for settlement purposes because these actions involve overlapping products, claims, legal theories, and settlement class members, and these cases otherwise meet the requirements for consolidation set forth in Rule 42(a) of the Federal Rules of Civil Procedure. It would be more efficient for the Court, settlement class members, and the parties to consolidate their filings in one action rather than duplicating the same notices, objections, appearances, motions, and other filings in all three cases.

In addition, Plaintiffs respectfully submit that this Court should:

1. Conditionally certify for settlement purposes only and authorize Plaintiffs to represent a settlement class consisting of all individual or entity end-users who purchased or received as a gift in the United States from September 6, 2001, to September 1, 2010, one or more of the HP inkjet printers identified in Exhibit F to the Stipulation of Settlement (the "Settlement Class"), because the proposed settlement class satisfies the requirements of Rules 23(a), (b), and (e) of the Federal Rules of Civil Procedure;

2. Preliminarily find that the proposed settlement reflected in the Stipulation of Settlement is fair, reasonable, and in the best interests of the proposed Settlement Class, and that it warrants notifying the Settlement Class of the terms of the proposed settlement and of their rights in connection with the proposed settlement;

3. Approve as to form and content the long form "NOTICE OF SETTLEMENT" ("Long Form Notice") and the summary "Notice of Proposed Class Action Settlement" ("Summary Notice"), substantially in the form set forth at Exhibits B and E to the Stipulation of Settlement;

4. Direct that the Long Form Notice and Summary Notice be disseminated in the manner described in Part III (paragraph 30) of the Stipulation of Settlement;

5. Establish deadlines for requests for exclusion from the Settlement Class and the filing of objections to the proposed settlement;

6. Set the hearing on the final approval of the proposed settlement and its terms for January 14, 2011; and

7. Prohibit the initiation or continuation of claims against HP by Plaintiffs and/or members of the Settlement Class, whose claims are released as set forth in the Stipulation of Settlement.

This Motion is based on this Notice of Motion; the attached Memorandum of Points and Authorities; the Declarations of Niall McCarthy and Cameron Azari; all supporting exhibits, settlement papers (including the Stipulation of Settlement and the proposed Long-Form Notice and Summary Notice, Preliminary Approval Order, and Final Order and Judgment), and other documents; the pleadings, orders, transcripts, and other papers on file in this matter; and any further evidence and arguments as may be presented at the hearing of this matter.

DATED: August 24, 2010

Respectfully submitted,

By: /s/ Niall P. McCarthy
Niall P. McCarthy
COTCHETT, PITRE & MCCARTHY

*Counsel for Plaintiffs and the Settlement Class and
On Behalf of the Proposed Settlement Class*

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Plaintiffs Daniel Feder, Nicklos Ciolino, Carl K. Rich, David Duran, Jackie Blennis, and David Brickner ("Plaintiffs") respectfully submit this Memorandum of Points and Authorities in support of their motion for an order consolidating the three separate actions entitled *In re: HP Inkjet Printer Litigation*, Case No. C05-3580 JF ("*Ciolino*"); *Rich v. Hewlett-Packard Co.*, Case No. C06-03361 JF ("*Rich*"); and *Blennis v. Hewlett-Packard Co.*, Case No. C07-00333 JF ("*Blennis*") for purposes of settlement, and for an order preliminarily approving the proposed settlement of these actions against defendant Hewlett-Packard Company ("HP").

For several years the parties have heavily litigated the *Ciolino*, *Rich*, and *Blennis* actions and have conducted extensive pretrial discovery (including the depositions of 17 witnesses, the production of more than 250,000 pages of documents, and more than 100 written discovery requests). Nonetheless, through extended settlement negotiations before Ret. Judge James Warren (and several other respected mediators), Plaintiffs have successfully negotiated a class settlement that provides the classes with meaningful relief in the form of enhanced disclosures that significantly reduce any prospective harm that Plaintiffs have alleged the class and other consumers (both now and in the foreseeable future) would sustain because they do not know certain important details of HP's inkjet technology.

There are two facets of this proposed settlement. First, as further detailed below, at their essence these class actions were brought because Plaintiffs alleged that HP did not disclose important details of its inkjet printer technology to consumers. Thus, a significant component of this settlement is to provide class members with additional information regarding certain features of HP inkjet printers. This settlement enhances disclosure. It thus directly addresses, and resolves, the core issue in these cases. With enhanced disclosure, millions of HP inkjet printer owners, now and in the future, will be empowered to better manage their use of ink and ultimately save money. Specifically, HP agrees to discontinue the use of certain pop-up messaging that includes the graphic image of an ink gauge, ruler, or container of ink, and to make certain changes to the disclosures on its website and to the packaging, manuals and/or user interfaces for HP

small-format inkjet printers. These changes include the following:

- (1) HP will incorporate disclosures into its website, user manuals, and/or user interfaces explaining that HP's low-on-ink messages (the technology at issue in *Ciolino*) are based on estimated ink levels and that actual ink levels may vary, and that the user does not have to replace a print cartridge when a low-on-ink message is received but rather may continue printing until the user is not satisfied with the print quality of the printed material or, if applicable, when the user reaches a "replace cartridge" message.
- (2) HP will incorporate on its website and/or user manuals disclosures regarding "underprinting"—the inkjet technology at issue in the *Rich* action, whereby certain HP color inkjet printers may, in certain circumstances depending on the printer settings and customer inputs, use a combination of inks from the tri-color (or other, non-black color) and black inkjet cartridges to produce black text and images. These disclosures will include a description of what underprinting is, why it is used, and some of the options for disabling or minimizing the use of underprinting. HP also will include disclosures regarding page yields including a summary of HP's ISO testing for page yields and an explanation that actual yield varies depending on the content of printed pages and other factors.
- (3) HP will incorporate disclosures into its website and/or product packaging regarding ink expiration—the technology at issue in the *Blennis* action, whereby HP may use built-in dates on which certain inkjet cartridges will stop working—including an explanation of the inkjet printers and cartridges that are subject to ink expiration, why HP employs ink expiration dates for certain printer models and how that date is determined, and how ink expiration works.

Accordingly, the benefits of this settlement will be felt far beyond the monetary relief provided.

Second, the proposed Settlement Class may receive direct monetary relief if they satisfy the eligibility requirements set forth in the Stipulation of Settlement. The monetary relief component of this settlement provides that every member of the Settlement Class may be eligible to receive an electronic credit to purchase printer products from HP for **each printer** that is included within the class definition below. The class members must affirmatively apply for these e-credits using an online claim form, and there is an overall cap of \$5,000,000 for this class benefit. Plaintiffs and class counsel anticipate that class members will be receiving the full, or close to the full, monetary benefits available under this settlement. The e-credits are the equivalent of cash and can be used for the purchase of products that class members actually use—HP printers and printer-related products including ink cartridges. Accordingly, the relief to the class is not comparable to "coupon" settlements.

1 The parties have negotiated a comprehensive notice program that will maximize the
 2 likelihood that class members will be provided with notice of the proposed settlement. The
 3 information provided will prevent future damage to the class from the challenged HP practices by
 4 providing easy to understand and user friendly examples of the changes to HP's business
 5 practices. The notice program includes the sending of e-mail notice to the e-mail addresses
 6 contained in HP's product registration database that class members have previously provided to
 7 HP through product registration or other customer contact (except for class members who have
 8 previously withheld their consent to being contacted by HP), and publication notice in PARADE
 9 magazine, USA WEEKEND, PEOPLE and CIO magazine, and in banner advertisements on
 10 YAHOO.COM and other websites through 24/7 REAL MEDIA NETWORK. An experienced class
 11 action claims administrator has assisted in the design of this notice program, and a notice expert
 12 has reviewed the notice plan and concluded that it is the most effective practicable notice program
 13 possible and that it complies with Rule 23 and the Due Process Clause. (Declaration of Cameron
 14 Azari ("Azari Decl."), ¶ 10.)

15 Class Counsel are experienced class action attorneys, and they also strongly believe that
 16 the Stipulation of Settlement is fair, reasonable, and adequate and represents a significant recovery
 17 based on the risks of establishing class certification and liability and damages at trial on the claims
 18 as set forth in the respective complaints in the three actions. (Declaration of Niall McCarthy
 19 ("McCarthy Decl."), ¶¶ 44-50.) Indeed, given the present posture of this action, the proposed
 20 settlement most assuredly passes the standard for an acceptable class action settlement.

21 Accordingly, Plaintiffs and their counsel respectfully request that this Court review the
 22 parties' Stipulation of Settlement (McCarthy Decl., Ex. B) and other materials provided, and enter
 23 an order:

- 24 1. Granting preliminary approval of the proposed settlement;
- 25 2. Conditionally certifying for settlement purposes the proposed settlement class of all
 26 individuals and entity end-users who purchased or received as a gift in the United States from
 27 September 6, 2001, to September 1, 2010, one or more of the HP inkjet printer models identified
 28 on Exhibit F to the Stipulation of Settlement;

3. Appointing Daniel Feder, Nicklos Ciolino, Carl K. Rich, David Duran, Jackie Blennis, and David Brickner as Settlement Class Representatives and their counsel, the law firms of Cotchett, Pitre & McCarthy; Kabateck Brown Kellner, LLP; Berk Law PLLC; Chavez & Gertler LLP; Cuneo, Waldman & Gilbert, LLC; Edelson & Associates, LLC; The Garcia Law Firm; Law Offices of Michael D. Liberty; Law Offices of Scott E. Shapiro, P.C.; McNicholas & McNicholas, LLP; Pearson, Simon, Warshaw & Penny, LLP; ShubLaw, LLC; and Seeger Weiss, LLP, as Class Counsel;

4. Directing that notice be given to settlement class members as proposed, including by e-mail to their last known e-mail addresses, to the extent such e-mail address information exists in HP's registration database, is a valid e-mail address, and the settlement class member has not withheld his/her consent to being contacted by HP via e-mail; and

5. Setting a hearing date and briefing schedule for final settlement approval and Class Counsel's fee and expense application.

II. THE LITIGATION OF THE ACTIONS

This settlement involves three separate yet intertwined class actions that were brought with respect to HP inkjet printers: the *Ciolino*, *Rich*, and *Blennis* actions.

The *Ciolino* action claims that certain HP inkjet printers used "low on ink" messaging technology to indicate that replacement of a cartridge is needed when the cartridge is not empty and is capable of additional printing, and that this technology confused customers into prematurely replacing their inkjet cartridges.

The *Rich* action claims that certain HP color inkjet printers used color ink in addition to black ink when printing black text and images without disclosing this to consumers and without providing consumers with the option of disabling this feature, that HP misrepresented and/or failed to disclose the actual page yield for the products at issue (including the true basis for the page yield and cost per page information provided to consumers), and that HP failed to disclose its use of color ink when printing black in connection with stating its page yields.

The *Blennis* action claims that HP designed certain inkjet printers and cartridges to shut down on an undisclosed expiration date, and that at this point consumers are prevented from using

1 any ink remaining in the expired cartridge and from using all of the printer's functions until the
2 expired cartridge is replaced.

3 HP denies all of these claims. And, as described below, the litigation of each action has
4 been prolonged and comprehensive, allowing all parties to thoroughly and intelligently assess the
5 risks of future litigation and the benefits of a negotiated compromise.

6 **A. The Ciolino Action**

7 On September 6, 2005, plaintiff Nicklos Ciolino commenced an action against HP in this
8 Court that challenged the "low on ink" ("LOI") warnings deployed on several lines of HP inkjet
9 printers as misleading and deceptive based on the following claims and alleged facts and practices:
10 (1) that HP programmed "Smart Chips" or used other LOI messaging technology in its inkjet
11 printers and cartridges to indicate that replacement of a cartridge is needed when the cartridge is
12 not empty and is capable of additional printing; (2) that HP's LOI messages, gauges, warnings, or
13 indicators were deceptive and misled and confused consumers into prematurely replacing their
14 inkjet cartridges; (3) that HP's "SureSupply" program and related marketing materials were
15 deceptive and misled consumers; (4) that plaintiffs and class members were deprived of the ability
16 to use all of the ink in their HP inkjet print cartridges; and (5) that plaintiffs and class members
17 purchasing the HP inkjet printers and cartridges at issue did not get the full value of what they
18 paid for and were promised.

19 The operative complaint in the *Ciolino* action (the Second Amended Complaint) asserts
20 claims for alleged violations of California's Unfair Competition Law (Cal. Bus. & Prof. Code §
21 17200 *et seq.*, "UCL"), California's False Advertising Law (Cal. Bus. & Prof. Code § 17500 *et*
22 *seq.*), California's Consumers Legal Remedies Act (Cal. Civ. Code § 1750 *et seq.*), and claims for
23 unjust enrichment, breach of express warranty, and breach of implied warranty on behalf of a
24 nationwide class of consumers.

25 HP aggressively defended the lawsuit with a number of arguments, including that the low-
26 on-ink messages were straightforward and did not tell or require consumers to replace their inkjet
27 cartridges. Rather, the messages informed consumers that they were low-on-ink, and that they
28

1 should consider having a replacement cartridge available for when print quality was no longer
2 acceptable to them.

3 In bridging the gap toward settlement, both sides made significant but rational
4 compromises. Plaintiffs accepted that not all of the low-on-ink messages were deceptive or
5 misleading, and asserted that the most confusing of the low on ink warnings were those with
6 graphic images showing near empty cartridges. HP agreed to eliminate those warning in a series
7 of business practice changes.

8 Significant damages were not appropriate or attainable in this case for several reasons.
9 First, although plaintiffs were confident they could establish that HP's "low on ink" warnings were
10 inaccurate, no warning actually and explicitly directs the consumer to "throw out your cartridge,"
11 nor does the activation of the warning shut down the cartridge prematurely. Moreover, it would be
12 difficult if not impossible to determine how much ink remains in a cartridge when discarded by a
13 consumer (particularly many years after the fact). Accordingly, a case to obtain individual
14 damages would be highly speculative and would more than likely not succeed. Thus, Plaintiffs
15 agreed that any cash (or cash-like relief) must be a small percentage of the total compensation
16 provided to the class, and, even then, consumers seeking to take advantage of these funds must
17 demonstrate they actually relied on the warnings and reasonably believed they were required to
18 "toss out" cartridges.

19 Further complicating the litigation and increasing the risk substantially of ultimately
20 succeeding was this Court's decision denying nationwide class certification on July 25, 2008.
21 Although that decision rested on "manageability" grounds, it did limit plaintiffs to moving
22 forward on their second attempt at class certification with a California-only state class. Moreover,
23 the court's companion decision on the same date, albeit denying HP's Motion for Summary
24 Judgment, included a discussion of plaintiffs' substantive claims that was skeptical of plaintiffs'
25 class claims and raised some doubt as to whether even a statewide class would be approved. In
26 effect, strident negotiation was the best opportunity to assure that the millions of members in the
27 class would receive some relief.

1 **B. The Rich Action**

2 On May 22, 2006, plaintiff Carl K. Rich commenced an action against HP in this Court
3 based on the following claims and alleged facts and practices: (1) that HP failed to disclose that
4 its color inkjet printers use color ink in addition to black ink when printing black text and images
5 (this technology is referred to as “underprinting”); (2) that HP failed to provide consumers of HP
6 color inkjet printers with the option of printing black text and images using ink from the black
7 print cartridge only; (3) that HP published and made representations regarding the page yield
8 specifications for its inkjet printers and cartridges but misrepresented and/or failed to disclose the
9 actual page yield customers would receive for the products at issue, including the true basis for the
10 page yield and cost per page information provided to consumers; and (4) that HP failed to disclose
11 its use of color ink when printing black in connection with stating its page yields for color inkjet
12 printers and cartridges, thereby increasing the actual costs of printing black text and images. The
13 operative complaint in the *Rich* action (the Second Amended Complaint) asserts claims for alleged
14 violations of the UCL, unjust enrichment, and fraudulent concealment on behalf of a nationwide
15 class of consumers.

16 Plaintiff Rich’s original complaint was amended twice. The First Amended Complaint
17 was filed on September 29, 2006, to add causes of action for breach of express warranty and
18 breach of the covenant of good faith and fair dealing (in addition to the claims discussed above).
19 The Second Amended Complaint was filed on January 12, 2007, following the Court’s order of
20 December 4, 2006 granting HP’s Motion to Dismiss. Based on this order, plaintiffs dropped their
21 claims for breach of contract, breach of express and implied warranty, and breach of the covenant
22 of good faith and fair dealing. The Second Amended Complaint (which HP answered on February
23 28, 2007) also introduced an additional plaintiff and proposed class representative (David Duran, a
24 resident of California) and maintained claims based on unjust enrichment, fraudulent concealment,
25 and violations of the UCL. In the Second Amended Complaint, Plaintiffs Rich and Duran allege
26 that HP designed its color inkjet printers to use color ink—in addition to the significantly less
27 expensive black ink—when printing black and white images and text, in order to force its
28

1 customers to prematurely deplete their color ink cartridges and therefore prematurely purchase the
2 expensive color inkjet cartridges.

3 On June 23, 2009, Plaintiffs filed a motion to certify two classes—a damages class
4 consisting solely of California consumers, and a proposed nationwide class for injunctive relief
5 only. On December 7, 2009, HP filed its Opposition to Plaintiffs’ motion for class certification,
6 and simultaneously filed a Motion for Summary Judgment, where it argued, *inter alia*, that: (1)
7 plaintiffs cannot establish that HP had an affirmative duty to disclose the allegedly concealed
8 information, and each of their claims fails as a result; (2) plaintiffs cannot establish that HP caused
9 them any harm, or that the allegedly concealed information was material to their purchase
10 decisions, thus entitling HP to summary judgment on plaintiffs’ fraudulent concealment and UCL
11 claims; and (3) plaintiffs’ purported “claim” for unjust enrichment fails because it necessarily
12 depends on, and falls with, their other fraud-based claims. In light of the parties’ extensive
13 settlement discussions, neither plaintiffs’ Motion for Class Certification nor HP’s Motion for
14 Summary Judgment has been heard, and this Court took them off calendar for administrative
15 reasons on March 8, 2010, pending the parties’ settlement discussions.

16 As with the *Ciolino* action, in bridging the gap toward settlement of the *Rich* action, both
17 sides made significant but rational compromises. Plaintiffs accepted that underprinting is a
18 legitimate and common technology that increases print quality. HP agreed to provide additional
19 disclosures to consumers regarding the use of underprinting, its pros and cons, and measures that
20 can be used to disable it.

21 Moreover, as with the *Ciolino* action, significant damages were not appropriate or
22 attainable in this *Rich* matter for several reasons. First, although plaintiffs were confident they
23 could establish that underprinting caused consumers to use color ink when they would not have
24 expected to, it would be difficult if not impossible to determine how much color ink is actually
25 expended by consumers due to underprinting. Furthermore, it would be difficult to establish that
26 had consumers known about underprinting, they would have chosen to disable it, and thereby
27 sacrifice the benefit of increased print quality due to underprinting. Accordingly, a case to obtain
28 individual damages would be highly speculative and would more than likely not succeed. Thus,

1 plaintiffs agreed that any cash (or cash-like relief) must be a small percentage of the total
2 compensation provided to the class.

3 **C. The Blennis Action**

4 On January 17, 2007, Plaintiffs Jackie Blennis and David Brickner commenced an action
5 against HP in this Court based on the following claims and alleged facts and practices: (1) that HP
6 designed certain of its inkjet printers and inkjet cartridges to shut down on an undisclosed
7 expiration date, at which point consumers are prevented from using the ink that remains in the
8 expired cartridge and from using all of the printer's functions (including scanning or faxing
9 documents) until the expired cartridge is replaced; (2) that HP failed to disclose and/or actively
10 concealed information regarding its use of expiration dates in certain of its inkjet printers and
11 cartridges; and (3) that HP interfered with the right of plaintiffs and the class members to possess
12 and use all of the ink in the HP print cartridges that they purchased.

13 The original complaint in the *Blennis* action asserts claims for alleged violations of the
14 UCL, fraudulent concealment, unjust enrichment, breach of express warranty, breach of implied
15 warranty, trespass, and conversion on behalf of a nationwide class of consumers. HP filed a
16 Motion to Dismiss the complaint. On March 25, 2008, the Court dismissed Plaintiff's claims for
17 express warranty, implied warranty, trespass to chattels and conversion. On May 8, 2008, HP
18 answered Plaintiffs' complaint. On December 8, 2009, Plaintiffs filed their Motion for Class
19 Certification, seeking to certify a class consisting of "All persons or entities in the United States
20 who own one or more models of Hewlett-Packard inkjet printers that use ink cartridges that have
21 an expiration date." In light of the parties' extensive settlement discussions, the Motion for Class
22 Certification has not yet been heard.

23 As with *Ciolino* and *Rich*, significant damages were not appropriate or attainable in this
24 *Blennis* matter for several reasons. First, although Plaintiffs were confident that they could
25 establish that HP employed expiration dates without properly disclosing those dates to consumers,
26 it would be difficult if not impossible to establish which consumers may have hit expiration dates
27 and how much ink, if any, may have remained in the cartridge at the time the expiration date was
28 hit. Furthermore, HP did provide some disclosures to consumers regarding ink expiration, and HP

1 believed that it had legitimate technical reasons for employing ink expiration dates in the limited
2 number of HP printer models where such expiration dates were employed. Accordingly, a case to
3 obtain individual damages would be highly speculative and would more than likely not succeed.
4 Thus, as in the *Ciolino* and *Rich* actions, Plaintiffs agreed that any cash (or cash-like relief) must
5 be a small percentage of the total compensation provided to the class.

6 **III. THE SETTLEMENT NEGOTIATIONS**

7 Throughout the *Ciolino*, *Rich*, and *Blennis* actions, the counsel for the parties engaged in
8 multiple informal but comprehensive settlement discussions, giving due consideration to the
9 parties' respective positions. Plaintiffs' counsel in the course of the litigations had conducted an
10 extensive investigation into the facts and law relating to the matters alleged in their respective
11 complaints. The investigation included: (1) the depositions of 17 witnesses; (2) the production of
12 more than 250,000 pages of documents; (3) more than 100 written discovery requests; (4) the
13 inspection of several of the HP Inkjet printers at issue; (5) consultations with industry personnel;
14 (6) extensive work with experts and testing by those experts; (7) numerous interviews of witnesses
15 and putative members of the classes; (8) the evaluation of information provided by current or
16 former employees of HP (including the HP engineers with primary responsibility for the design of
17 some of the HP inkjet printer models at issue and matters related thereto); and (9) legal research as
18 to the sufficiency of the claims.

19 As a result of the foregoing investigation, Plaintiffs and their counsel obtained
20 comprehensive knowledge of HP's printer technology which extended to all three actions, and
21 received, examined, and analyzed information, documents, printers, components, and materials
22 that they deemed necessary and appropriate to enable them to enter into a settlement on a fully
23 informed basis. Settlement was ultimately reached as a result of extensive arm's length
24 negotiations between counsel for Plaintiffs in the *Ciolino*, *Rich*, and *Blennis* actions, on the one
25 hand, and counsel for HP, on the other hand, occurring over several years and multiple mediation
26 sessions with several highly respected and nationally-recognized mediators—the Honorable
27 Daniel Weinstein of JAMS (*Ciolino*), the Honorable James L. Warren of JAMS (in the *Ciolino*
28 and *Rich* actions), and Alexander S. Polsky, Esq., of JAMS (*Blennis*).

Accordingly, the parties have entered into a Stipulation of Settlement that provides class members with sufficient information to make a reasoned decision regarding the future purchase of HP inkjet printers, and some monetary compensation for the alleged damages sustained by the *Ciolino*, *Rich*, and *Blennis* classes, as described below.

A. Injunctive Relief

As discussed above, the *Ciolino*, *Rich*, and *Blennis* actions focus on alleged nondisclosure of information about certain features of, and technology used in, HP's inkjet printers. The injunctive relief provided to the Settlement Class addresses the core complaint in each case by requiring HP to discontinue the use of certain pop-up messaging that includes the graphic image of an ink gauge, ruler, or container of ink, and by requiring HP to disclose additional information regarding the HP technology that forms the basis of the *Ciolino*, *Rich*, and *Blennis* actions on HP's website (a location where HP customers already obtain information about and can purchase HP printer products), and in the packaging, manuals, and/or user interfaces for HP inkjet printers.

Specifically, these changes and disclosures include the following:

- (1) HP will incorporate disclosures into its website, user manuals, and/or user interfaces explaining that HP's low-on-ink messages (the technology at issue in *Ciolino*) are based on estimated ink levels and that actual ink levels may vary, and that the user does not have to replace a print cartridge when a low-on-ink message is received but rather may continue printing until the user is not satisfied with the print quality of the printed material or, if applicable, when the user reaches a "replace cartridge" message.
- (2) HP will incorporate on its website and/or user manuals disclosures regarding "underprinting"—the inkjet technology at issue in the *Rich* action, whereby certain HP color inkjet printers may, in certain circumstances depending on the printer settings and customer inputs, use a combination of inks from the tri-color (or other, non-black color) and black inkjet cartridges to produce black text and images. These disclosures will include a description of what underprinting is, why it is used, and some of the options for disabling or minimizing the use of underprinting. HP also will include disclosures regarding page yields including a summary of HP's ISO testing for page yields and an explanation that actual yield varies depending on the content of printed pages and other factors.
- (3) HP will incorporate disclosures into its website and/or product packaging regarding ink expiration—the technology at issue in the *Blennis* action, whereby HP may use built-in dates on which certain inkjet cartridges will stop working—including an explanation of the inkjet printers and cartridges that are subject to

ink expiration, why HP employs ink expiration dates for certain printer models and how that date is determined, and how ink expiration works.

Class counsel believes that these disclosures achieve the primary objective of the *Ciolino*, *Rich*, and *Blennis* actions.

B. E-Credits

The parties also negotiated some direct monetary relief to the class members in the *Ciolino*, *Rich*, and *Blennis* actions. Given the current litigation posture of the cases, Plaintiffs and their counsel believe that the compensation is eminently fair and reasonable. In settlement of these three matters, HP has agreed to create a pool of up to \$5,000,000 in monetary e-credits that can be used for the purchase of printers or printer supplies online at HP's website (www.shopping.hp.com). Each participating settlement class member in the *Ciolino* action will be eligible to receive up to \$5.00 in e-credits for each *Ciolino* printer model purchased or received as a gift. Each participating settlement class member in the *Rich* action will be eligible to receive up to \$2.00 in e-credits for each *Rich* printer model purchased or received as a gift. Each participating settlement class member in the *Blennis* action will be eligible to receive up to \$6.00 in e-credits for each *Blennis* printer model purchased or received as a gift.¹

The claims process is slightly different for the *Rich* class members as compared with the *Ciolino* and *Blennis* class members. With respect to each printer purchased or received as a gift in the *Rich* action, the class member need only provide proof of ownership (e.g., the serial number or other proof) in order to obtain the e-credit of up to \$2.00. No attestation or further proof of injury will be required to recover an e-credit for *Rich* class members.

With respect to each printer purchased or received as a gift in the *Ciolino* action, the class member must not only provide proof of ownership, but must also declare that they: (a) received a LOI Message; (b) believed that they were out of ink as a result of the LOI Message they received;

¹ As described in the Stipulation of Settlement (paragraph 38), if the Settlement Class Members submit eligible claim forms exceeding the \$5,000,000 cap, the settlement administrator shall determine each authorized Settlement Class Member's pro rata share based upon that member's claim form and the total number of valid claim forms received. Accordingly, the actual amount recoverable by each Settlement Class member will not be determined until after the claims period has ended and all claims forms have been received.

1 and (c) removed the inkjet cartridges upon receiving the LOI Message without using the remaining
2 ink.

3 Likewise, with respect to each printer purchased or received as a gift in the *Blennis* action,
4 the class member must not only provide proof of ownership, but must also declare that they
5 purchased an inkjet cartridge for their inkjet printer that reached the ink expiration date before the
6 cartridge had been fully used. Given the fact that *Ciolino* class members might not have received
7 a LOI Message, might not have believed they were out of ink as a result, or might not have
8 removed the inkjet cartridge without using the remaining ink, and that *Blennis* class members
9 might have fully used their inkjet cartridge before that cartridge reached the ink expiration date,
10 Plaintiffs and their counsel believe this additional condition is fair. To ease the burden for the
11 claims submission process, the claim form will be submitted electronically.

12 **C. Other Aspects of the Settlement**

13 HP has agreed to pay for the class notice and administration (up to \$950,000), and class
14 counsel was able to secure very comprehensive notice by utilizing the economies of scale of
15 having the notice combined for the *Ciolino*, *Rich*, and *Blennis* actions.²

16 The notice will be provided through the following means: (a) e-mail of the Long Form
17 Notice to the last known e-mail addresses of settlement class members, to the extent such e-mail
18 address information exists in HP's databases and the settlement class member has not withheld
19 his/her consent to be contacted by HP via e-mail; (b) publication notice including PARADE
20 magazine, USA WEEKEND, PEOPLE and CIO magazine; and (c) online "banner" advertisements on
21 YAHOO.COM and other websites through 24/7 REAL MEDIA NETWORK. Complete details of the
22 notice program are set forth in the declarations of Cameron Azari and Niall McCarthy, along with
23

24 ² In addition, class counsel and HP also are negotiating a settlement of cases pending in the
25 United States District Court for the Central District of California asserting claims that certain HP
26 color laser printers stop printing when there is still enough toner in the cartridge to continue to
27 print. See *Baggett v. Hewlett-Packard Co.*, C.D. Cal. Case No. SA CV 07-00667 (filed July 6,
28 2007, and assigned to Guilford, J.; summary judgment granted Sept. 29, 2009); *Young v. Hewlett-*
Packard Co., C.D. Cal. Case No. Case No. CV 09-00315 (filed Jan. 14, 2009, and assigned to
Guilford, J.; dismissed on Mar. 16, 2010). The parties have arranged to coordinate the publication
and e-mail notices in the inkjet (*Ciolino*, *Rich*, and *Blennis*) and laser (*Baggett* and *Young*) cases in
order to achieve certain efficiencies.

the proposed content of the notice. Plaintiffs, class counsel, and the notice expert that they have retained anticipate that this notice will reach approximately 75% of class members based on conservative estimates. (Azari Decl., ¶ 10.)³

In addition, HP has agreed, subject to Court approval, to pay a stipend not to exceed \$1,000 to each named Plaintiff in the *Ciolino*, *Rich*, and *Blennis* actions. HP has also agreed, subject to the Court's approval, to separately pay to Plaintiffs' counsel's attorneys' fees, costs, and expenses in an amount not to exceed \$2,900,000. The payment will be in lieu of statutory fees that Plaintiffs and/or their attorneys might otherwise be entitled to recover on their claims, including claims for injunctive relief, and this amount is inclusive of all fees and costs of class counsel in the *Ciolino*, *Rich*, and *Blennis* actions. Plaintiffs' counsel negotiated attorneys' fees after the class benefit was negotiated, and agreed to a fee that represents a fraction of the lodestar hours actually worked on the *Ciolino*, *Rich*, and *Blennis* actions. (McCarthy Decl., ¶ 36)

Finally, in exchange for all of the aforementioned benefits provided by HP under the settlement, Plaintiffs and members of the *Ciolino*, *Rich*, and *Blennis* classes will fully release HP from all claims that relate to the *Ciolino*, *Rich*, and *Blennis* actions. (McCarthy Decl., Ex. B, [Stipulation of Settlement, ¶¶ 21, 50-55].)

IV. THE CASES SHOULD BE CONSOLIDATED FOR SETTLEMENT PURPOSES

The *Ciolino*, *Rich*, and *Blennis* actions involve overlapping products, claims, theories, and class members. For example, in each action the printer models at issue consist entirely of HP's consumer inkjet printers, and indeed, in many instances, as demonstrated by the compilation of HP inkjet printers listed in Exhibit F to the Stipulation of Settlement, the same inkjet printer could be involved in multiple cases. (McCarthy Decl., Ex. B [Stipulation of Settlement, ¶¶ 33-35].) Thus, a settlement class member under the Stipulation of Settlement could concurrently belong to multiple class definitions as outlined in each of the operative complaints in *Ciolino*, *Rich*, and *Blennis*, by virtue of their ownership of a single HP inkjet printer. Indeed, members of the Settlement Class are eligible to receive settlement benefits under more than one case based on a

³ When combined with the notice provided in the settlement of the laser cases (*Baggett* and *Young*), this total reaches 80 %. (Azari Dec. ¶ 11.)

1 single printer purchase, and the relief provided to HP's customers pursuant to the Stipulation of
2 Settlement is similar for all three cases.

3 The consolidation of the three related HP inkjet cases also recognizes the similarity of
4 claims and theories asserted by each of the three cases. Each case asserted as its core that HP
5 violated the UCL. (See McCarthy Decl., Ex. B [Stipulation of Settlement, ¶ 21(a)(i)].)
6 Coordinated resolution of the *Ciolino*, *Rich*, and *Blennis* actions is also warranted by the factual
7 claims of each of the complaints involved, which are in essence claims about the quantity of
8 output, and the amount of usable ink or value received from the HP inkjet printer models and their
9 corresponding HP inkjet cartridges.

10 For all of these reasons, consolidation of what are essentially three overlapping classes into
11 one settlement class is practical, reasonable, efficient, and appropriate for the purposes of
12 settlement. The Court should consolidate the *Ciolino*, *Rich*, and *Blennis* actions so that the Court
13 can administer this settlement in one action rather than in three separate actions. Consolidation
14 also is more efficient for settlement class members. In fact, the economies of scale in the
15 comprehensive notice program would only be possible if these actions are settled jointly.

16 Accordingly, Plaintiffs request that the Court consolidate these related actions pursuant to
17 Rule 42(a) of the Federal Rules of Civil Procedure, which provides that "[i]f actions before the
18 court involve a common question of law or fact, the court may: (1) join for hearing or trial any or
19 all matters at issue in the actions; (2) consolidate the actions; or (3) issue any other orders to avoid
20 unnecessary cost or delay." Here, each action asserts substantially the same claims against the
21 same defendant and raises substantially the same questions of law and fact. In order to promote
22 judicial efficiency and avoid any potential inconsistent adjudications should the Court require
23 modification of the notice or other terms of the settlement, the actions should be consolidated.

24 **V. THE COURT SHOULD APPROVE THE PROPOSED SETTLEMENT**

25 Settlement of these cases will benefit millions of consumers by shifting longstanding
26 embedded business practices toward the benefit of consumers. With added disclosure and
27 transparency comes a more knowledgeable consumer who will have the opportunity to enjoy
28 greater value from their inkjet printers—and ultimately save money and work more efficiently.

1 The parties have worked diligently to reach this compromise. It is reasonable and provides
 2 important relief to the class.

3 Federal Rule of Civil Procedure 23(e) provides that any compromise of a class action must
 4 receive court approval. At the preliminary approval stage, a court must determine whether a
 5 proposed settlement is “within the range of possible approval” and whether notice should be sent
 6 to class members. *See Staton v. Boeing Co.*, 327 F.3d 938, 952 (9th Cir. 2003); *In re Corrugated*
 7 *Container Antitrust Litig.*, 643 F.2d 195, 205 (5th Cir. 1981); *In re M.L. Stern Overtime Litig.*,
 8 2009 WL 995864, at *3 (S.D. Cal. 2009); *Acosta v. Trans Union*, 243 F.R.D. 377, 386 (C.D. Cal.
 9 2007) (“To determine whether preliminary approval is appropriate, the settlement need only be
 10 potentially fair, as the Court will make a final determination of its adequacy at the hearing on Final
 11 Approval, after such time as any party has had a chance to object and/or opt out.”). The proposed
 12 settlement of these actions easily satisfies the standard for preliminary approval.

13 As a preliminary matter, settlements of complex class actions prior to trial are strongly
 14 favored. *See, e.g., Churchill Village, LLC v. General Electric Co.*, 361 F.3d 566, 576 (9th Cir.
 15 2004); *In re Pacific Enterprises Securities Litig.*, 47 F.3d 373, 378 (9th Cir. 1995); and *Class*
 16 *Plaintiffs v. City of Seattle*, 955 F.2d 1268, 1276 (9th Cir. 1992). “[I]f the proposed settlement
 17 appears to be the product of serious, informed, non-collusive negotiations, has no obvious
 18 deficiencies, does not improperly grant preferential treatment to class representatives or segments
 19 of the class, and falls within the range of possible approval, then the court should direct that notice
 20 be given to the class members of a formal fairness hearing.” *Chun-Hoon v. McKee Foods Corp.*,
 21 2009 WL 3349549, at *2 (N.D. Cal. Oct. 15, 2009). The Court makes a preliminary determination
 22 of the settlement’s fairness, reasonableness and adequacy, pointing out any settlement terms that
 23 are so unacceptable at the outset that a formal fairness hearing would be a waste of time. *See*
 24 *Manual for Complex Litigation*, § 21.632; 4 Alba Conte & Herbert B. Newberg, *Newberg on*
 25 *Class Actions* § 11.25 (4th ed. 2002).

26 In fact, the Ninth Circuit has repeatedly ruled that the courts “put a good deal of stock in
 27 [class settlements that are] the product of arms-length, non-collusive, negotiated resolution.”
 28 *Rodriguez v. West Publishing Corp.*, 563 F.3d 948, 965 (9th Cir. 2009); *Hanlon v. Chrysler Corp.*

1 150 F.3d 1011, 1027 (9th Cir. 1998). Here, the settlement was negotiated by reputable counsel, at
2 arms-length, before Hon. James Warren, a respected retired Judge. (McCarthy Decl., ¶ 28.)
3 Accordingly, the presumption for approval should be applied to this settlement.

4 **A. The Proposed Settlement Merits Preliminary Approval**

5 Both procedurally and substantively, the proposed settlement warrants preliminary
6 approval. Procedurally, the settlement was negotiated at arm's length by experienced counsel on
7 both sides of the table, who are fully versed in class litigation, particularly with respect to
8 consumer class action litigation and specifically technology related claims and product defect
9 cases. (McCarthy Decl., ¶ 41.) Substantively, the settlement provides material and valuable class
10 wide relief, does not grant preferential treatment to class representatives, and does not provide
11 attorneys' fees at the expense of the class. (*Id.*)

12 Mandated in the settlement are changes in business practices that will be real and
13 substantial. Primarily, millions of consumers will enjoy enhanced disclosures explaining, and
14 making clearer, a range of critical information about the use of their inkjet printers and
15 replacement cartridges. For example this heightened disclosure regime will enable consumers to
16 better understand low on ink warnings and use those warnings to their advantage. Similarly,
17 consumers will have a better understanding of when they are using color ink in connection with
18 printing plain old black. Finally, consumers will better understand which inkjet printers and
19 cartridges are subject to ink expiration, why HP employs this technology, and how it works. This
20 is the type of injunctive relief that the *Ciolino*, *Rich*, and *Blennis* classes would have obtained only
21 if they had prevailed at trial and through appeal.

22 Finally, given the relative strengths of the parties' positions the direct compensation
23 portion of the settlement is fair and reasonable. Indeed, since virtually all class members use HP
24 products, the e-credit is something that can be used by virtually all class members. The
25 amounts—up to \$5.00 for each *Ciolino* printer, up to \$2.00 for each *Rich* printer, and up to \$6.00
26 for each *Blennis* printer—are fair and reasonable, particularly when considering the risks and
27 uncertainties of further litigation and the likelihood that if the cases proceeded to judgment, class
28

members may ultimately receive nothing (no injunctive or monetary relief). (McCarthy Decl., ¶ 43.)

B. The Proposed Settlement Class Satisfies the Requirements of Rule 23

Before granting preliminary approval of a settlement, the Court must determine that the proposed settlement class is a proper class for settlement purposes. *See generally* Fed. R. Civ. P. 23(e); Manual for Complex Litigation (4th ed. 2004) § 21.632; *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 620 (1997). Rule 23(e) governs the issue of class certification, whether the proposed class is a litigated class or, as here, a settlement class. All criteria for certification of a class for litigation purposes, except manageability, apply to certification for settlement purposes. *Amchem Prods.*, 521 U.S. at 620. Courts routinely and properly certify classes for settlement purposes only and the proposed certification of the class is entirely consistent with the applicable authorities. *Id.* at 619-29.

1. Numerosity. The proposed class meets the requirement of numerosity, in that it is comprised of over one million members. *Hanlon*, 150 F.3d at 1019 (“The prerequisite of numerosity is discharged if the class is so large that joinder of all members is impracticable.”).

2. Commonality. The second prerequisite to class certification is the existence of questions of law or fact common to the class. Fed. R. Civ. P. 23(a)(2). The Ninth Circuit has made clear that in the litigation context, the commonality requirement is to be “construed permissively.” *Dukes v. Wal-Mart, Inc.*, 603 F.3d 571, 559-600 (9th Cir. 2010). Commonality can be established by showing “that the class is united by a common interest.” *See Blackie v. Barrack*, 524 F.2d 891, 901 (9th Cir.1975) (holding that “slight differences in class members’ positions” will not defeat commonality). The existence of “shared legal issues” will satisfy the commonality requirement, even if there are “divergent factual predicates.” *Dukes*, 603 F.3d at 559. Because the test of commonality is qualitative rather than quantitative, “one significant issue common to the class may be sufficient to warrant certification.” *Id.*

Here, the questions of fact and law which are common include the following:

- (a) whether the relevant LOI warnings at issue in the *Ciolino* action were inaccurate and misleading;
- (b) whether HP knew that these warnings were inaccurate and misleading;

- (c) whether HP failed to disclose or concealed the inaccuracies in its LOI sensors;
- (d) whether HP warranted the accuracy of its LOI technology in its common material to class members;
- (e) whether HP's concealments and/or failure to disclose would have been material to any reasonable person who purchase the product;
- (f) whether HP was unjustly enriched by its conduct;
- (g) whether class members are entitled to monetary recovery including restitution, disgorgement or profits and/or punitive damages, and the proper nature, extent, and measure of such relief;
- (h) whether class members are entitled to injunctive relief to prevent HP from continuing to engage in its deceptive and harmful practices;
- (i) whether the printers at issue in the *Rich* action use color ink when printing black and white images and text;
- (j) whether HP disclosed that the printers at issue in the *Rich* action deplete color ink when printing black images and text;
- (k) whether HP was required to disclose that the printers at issue in the *Rich* action deplete color ink when printing black images and text;
- (l) whether HP's failure to disclose that the printers deplete color ink when printing black images and text was likely to deceive members of the public;
- (m) whether the printer cartridges at issue in the *Blennis* action "expire" on a certain date;
- (n) whether HP disclosed to consumers that the printer cartridges "expire" on a certain dates;
- (o) whether the printer cartridges "expire" even if a significant amount of usable ink remains in the cartridges;
- (p) whether the subject printers cease all operations until the "expired" cartridge is replaced; and
- (q) whether HP was required to disclose that its cartridges "expire," even with usable ink remaining.

3. Typicality. The third prerequisite of typicality is also satisfied. A plaintiff's claim is typical "if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members and his or her claims are based on the same legal theory." *De La Fuente v. Stokely- Van Camp, Inc.*, 713 F.2d 225, 232 (7th Cir. 1983). Slight factual distinctions between the named plaintiff and the claims of absent class members do not undermine typicality. *In re Glassine & Greaseproof Paper Antitrust Litig.*, 88 F.R.D. 302, 304 (E.D. Pa. 1980). Rather, courts focus on the defendants' conduct and the plaintiff's legal theory. *Rosario v. Livaditis*, 963 F.2d 1013, 1018 (7th Cir. 1992). "Under the rule's permissive standards, representative claims are

1 'typical' if they are reasonably coextensive with those of absent class members; they need not be
2 substantially identical." *Hanlon*, 150 F.3d at 1020.

3 When it is alleged that the same unlawful conduct was directed at or affected both the
4 named Plaintiffs and the classes sought to be represented, the typicality requirement is usually
5 satisfied, irrespective of varying fact patterns which underlie individual claims. *Smith v.*
6 *University of Washington Law School*, 2 F.Supp.2d 1324, 1342 (W.D. Wa. 1998) ("Typicality
7 turns on the defendant's actions toward the plaintiff class, not particularized defenses against
8 individual class members."). Furthermore, the test for typicality is whether other members have
9 the same or similar injury, whether the action is based on conduct which is not unique to the
10 named plaintiffs, and whether other class members have been injured by the same course of
11 conduct. *Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992) (quoting *Schwartz v.*
12 *Harp*, 108 F.R.D. 279, 282 (C.D. Cal. 1985)). The typicality requirement is construed liberally.
13 *Scholes v. Stone, McGuire & Benjamin*, 143 F.R.D. 181, 185 (N.D. Ill. 1992). Accordingly,
14 differences that may exist in the amount of injury suffered by each class members do not render
15 plaintiffs' claims atypical. *Armstrong v. Davis*, 275 F.3d 849, 869 (9th Cir. 2001).

16 Here, proposed settlement class representatives Feder, Ciolino, Rich, Duran, Blennis, and
17 Brickner are typical of the classes they seek to represent. All six owned class printers and their
18 claims are "reasonably coextensive with those of absent class members." *Dukes*, 603 F.3d at 613.
19 Neither Feder, Ciolino, Rich, Duran, Blennis, nor Brickner has any conflicts of interest with the
20 proposed class, and they are represented by qualified and competent counsel. (McCarthy Decl., ¶¶
21 4-7.)

22 4. Adequacy. The Named Plaintiffs will fairly and adequately protect the interests of the
23 class for purposes of this settlement. The adequacy requirement has two prongs: "(1) That the
24 representative parties' attorney be qualified, experienced, and generally able to conduct the
25 litigation; and (2) that the suit not be collusive and plaintiff's interests not be antagonistic to the
26 class." *In re United Energy Corp. Solar Power Modules Tax Shelter Investors Securities*
27 *Litigation*, 122 F.R.D. 251, 257 (C.D. Cal. 1988).

Both prongs are met here. First, Plaintiffs in the various actions have retained counsel who are qualified and experienced to litigate this action. The Court appointed co-lead class counsel early in these actions, and the Court appointed a Plaintiffs' Executive Committee of attorneys highly experienced in consumer class actions and complex litigation. Second, the Named Plaintiffs and Class Members do not have antagonistic interests. On the contrary, the Named Plaintiffs and Class Members are united in their common interest in pursuing claims against HP. Moreover, as discussed herein, this settlement was reached after vigorous litigation and arms-length negotiations.

5. Rule 23(b). Finally, once the four prerequisites of Rule 23(a) are met, "the potential class must also satisfy at least one provision of Rule 23(b)." *Rosario*, 963 F.2d at 1017; *see also General Tel Co. v. Falcon*, 457 U.S. 147, 161 (1982). Here, the classes satisfy not only Rule 23(b)(2) in that injunctive relief is being provided respecting the class as a whole, but also Rule 23(b)(3).

Rule 23(b)(3) states that a class may be certified when "questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and [...] a class action is superior to other available methods for the fair and efficient adjudication of the controversy." These requirements are satisfied here.

The questions of law and fact common to all class members are set forth above. These common issues predominate over any individual issues such as the nature and extent of damages. *Blackie*, 524 F.2d at 905 ("The amount of damages is invariably an individual question and does not defeat class action treatment."). Indeed, in the context of settlement issues regarding manageability (such as the calculation) are irrelevant. *Amchem Prods.*, 521 U.S. at 620 (where a district court is confronted with a settlement-only class certification, the court need not inquire whether the case, if tried, would present manageability problems because the point is that there will be no trial).

Additionally, a class action is clearly superior to other available methods for the fair and efficient adjudication of the controversy because joinder of all class members would be impracticable. Fed. R. Civ. P. 23(b)(3). Furthermore, because the damages suffered by individual

1 members of the settlement class may be relatively small, the expenses and burden of individual
 2 litigation would make it impossible for all settlement class members to individually redress the
 3 harm done to them. *Id.*

4 In short, the Settlement Class is suitable for certification, and the Court should certify the
 5 Settlement Class pursuant to Rule 23(b)(3), for purposes of granting preliminary approval to the
 6 settlement.⁴

7 **C. The Court Should Order Dissemination Of The Proposed Class Notice**

8 Rule 23(e)(1)(B) states that, “[t]he court must direct notice in a reasonable manner to all
 9 class members who would be bound by a proposed settlement, voluntary dismissal, or
 10 compromise.” Rule 23(e) requires that notice of a proposed settlement inform class members of
 11 the following: (1) the nature of the pending litigation; (2) the general terms of the proposed
 12 settlement; (3) that complete information is available from the court files; and (4) that any class
 13 member may appear and be heard at the fairness hearing. *Newberg on Class Actions* § 8.32, at
 14 262-68. The notice must also indicate an opportunity to opt out, that the judgment will bind all
 15 class members who do not opt out, and that any member who does not opt out may appear through
 16 counsel. Fed. R. Civ. P. 23(c)(2).

17 Here, Plaintiffs request approval of the proposed Long Form Notice and Summary Notice.
 18 (McCarthy Decl., Ex. B, Attachments B & E; *see also* Azari Dec., Attachment B.) The Long
 19 Form Notice and Summary Notice meet all of the requirements of Rule 23(e): they identify the
 20 Plaintiffs and the Defendant, and describe the lawsuit and the settlement classes in a
 21 straightforward manner; succinctly describe the essential terms of the proposed settlement, and
 22 identify all parties against whose claims are being released; provide class members with
 23 information on how to opt-out of the Settlement Class and provide all applicable deadlines for
 24 such action; and inform settlement class members that if they do not exclude themselves from the
 25 Settlement Class, and the settlement is approved, they will be bound by the resulting judgment. In
 26 addition, the notices instruct settlement class members to contact class counsel to obtain more
 27

28 ⁴ HP has agreed not to contest class certification solely for purposes of this settlement.
 (McCarthy Decl., Ex. B [Stipulation of Settlement, ¶¶ 78-79].)

1 detailed information and provides information regarding counsel's fee and expense application. In
 2 short, the notice will provide the necessary information for settlement class members to make an
 3 informed decision regarding the proposed settlement.

4 As a general rule, due process requires individualized notice where the names and
 5 addresses of class members "may be ascertained through reasonable effort," *Eisen v. Carlisle and*
 6 *Jacquelin*, 417 U.S. 156, 173, 177 (1974), and "is appropriate, for example, if class members are
 7 required to take action—such as filing claims—to participate in the judgment, or if the court
 8 orders a settlement opt-out opportunity under Rule 23(e)(3)." See Fed. R. Civ. P. 23(e)(1), 2003
 9 Committee Note. As the Courts have repeatedly held, notice by direct mail or e-mail and
 10 publication are often the "best practicable" notice under the circumstances. *Silber v. Mabon*, 18
 11 F.3d 1449, 1453-54 (9th Cir. 1994).

12 Here, the proposed settlement provides for a combination of notice by e-mail (to the last
 13 known e-mail addresses of settlement class members, to the extent such e-mail address
 14 information exists in HP's databases and the class member has not withheld his/her consent to be
 15 contacted by HP via e-mail) and a comprehensive notice program involving publication in
 16 PARADE magazine, USA WEEKEND, PEOPLE and CIO magazine, and in banner advertisements on
 17 YAHOO.COM and other websites through 24/7 REAL MEDIA NETWORK. (Azari Decl. ¶¶ 12-16.)
 18 The notice plan will reach approximately 75% of its target audience based on conservative
 19 estimates. (*Id.* ¶ 10.)⁵ The comprehensive notice program here more than sufficiently satisfies all
 20 due process requirements. See, e.g., *Farinella v. PayPal, Inc.*, 611 F. Supp. 2d 250, 256-57
 21 (E.D.N.Y. 2009) (court approved plan disseminating notice by email, internet posting, and
 22 publication); *In re Grand Theft Auto Video Game Consumer Litig.*, 251 F.R.D. 139, 145 (S.D.N.Y.
 23 2008) (same); see also *Todd v. Retail Concepts, Inc.*, No. 07-0788, 2008 WL 3981593, at *2
 24 (M.D. Tenn. Aug. 22, 2008) (court approved plan disseminating notice by email, in-store posting,
 25 and website posting).

26
 27
 28 ⁵ As discussed above, the effectiveness of this notice plan will be augmented by the
 concurrent notice plan to be implemented in the LaserJet Printer Settlement in the United States
 District Court for the Central District of California. (Azari Decl. ¶ 19.)

D. The Court Should Set A Schedule For Final Approval

The next steps in the settlement approval process are to notify the class of the proposed settlement, allow settlement class members an opportunity to file any objections or opt outs and hold a final approval hearing. The parties respectfully propose the following schedule:

Deadline to disseminate Class Notice	30 days after Preliminary Approval Order
Deadline to file fee application papers	November 3, 2010
Deadline for settlement class members to opt-out	December 8, 2010
Deadline for settlement class members to file comments supporting or objecting to the settlement and/or attorneys' fees	December 8, 2010
Deadline for the parties' responses to any objections	December 23, 2010
Deadline to file final approval papers	December 23, 2010
Final settlement approval hearing	January 14, 2011
Deadline for Class Members to file claim forms	February 1, 2011

VI. CONCLUSION

For the foregoing reasons, Plaintiffs Feder, Ciolino, Rich, Duran, Blennis and Brickner and their counsel respectfully request that the Court enter the accompanying Proposed Order granting preliminary approval of the proposed settlement, certifying the settlement class, appointing Plaintiffs as Class Representatives and their attorneys as Class Counsel, directing dissemination of class notice, and setting a hearing for the purpose of deciding whether to grant final approval of the settlement.

DATED: August 25, 2010

Respectfully submitted,

By: /s/ Niall P. McCarthy
Niall P. McCarthy

*Counsel for Plaintiffs and the Settlement Class and
On Behalf of the Proposed Settlement Class*

Niall P. McCarthy
Justin T. Berger
COTCHETT, PITRE & MCCARTHY
San Francisco Airport Office Center
840 Malcolm Road, Suite 200
Burlingame, CA 94010
Telephone: (650) 697-6000
Facsimile: (650) 697-0577
nmccarthy@cpmlegal.com
jberger@cpmlegal.com

1 Brian S. Kabateck
2 Richard L. Kellner
3 KABATECK BROWN KELLNER LLP
4 644 South Figueroa Street
5 Los Angeles, CA 90017
6 Telephone: (213) 217-5000
7 Facsimile: (213) 217-5010
8 bsk@kbklawyers.com
9 rlk@kbklawyers.com

6 Steven N. Berk
7 BERK LAW PLLC
8 1225 15th Street, N.W.
9 Washington D.C. 20005
10 Telephone: (202) 232-7550
11 Facsimile: (202) 232-7556
12 steven@berklawdc.com

10 Mark Andrew Chavez
11 CHAVEZ & GERTLER LLP
12 42 Miller Avenue
13 Mill Valley, CA 93941
14 Telephone: (415) 381-5599
15 Facsimile: (415) 381-5572
16 mark@chavezgertler.com

14 Jon Cuneo
15 CUNEO, WALDMAN & GILBERT LLC
16 317 Massachusetts Avenue
17 Suite 300
18 Washington, DC 20002
19 Telephone: (202) 789-3960
20 Facsimile: (202) 789-1813
21 jonc@cuneolaw.com

18 Marc Howard Edelson
19 EDELSON & ASSOCIATES LLC
20 45 West Court Street
21 Doylestown, PA 18901
22 Telephone: (215) 230-8043
23 Facsimile: (215) 230-8735
24 medelson@edelson-law.com

22 Stephen Garcia
23 THE GARCIA LAW FIRM
24 1 World Trade Center #1950
25 Long Beach, CA 90831-1950
26 Telephone: (562) 216-5270
27 Facsimile: (562) 216-5271
28 sgarcia@lawgarcia.com

1 Michael D. Liberty
2 LAW OFFICES OF MICHAEL D. LIBERTY
3 1290 Howard Avenue, Suite 303
4 Burlingame, CA 94010
5 Telephone: (650) 685-8085
6 Facsimile: (650) 685-8086
7 mdlaw@pacbell.net

8 Scott E. Shapiro
9 LAW OFFICE OF SCOTT E. SHAPIRO, PC
10 9701 West Pico Boulevard, Suite 110
11 Los Angeles, CA 90035
12 Telephone: (310) 720-5501
13 Facsimile: (310) 388-4612
14 scott.e.shapiro.esq@gmail.com

15 John Patrick McNicholas, IV
16 McNICHOLAS & McNICHOLAS LLP
17 10866 Wilshire Boulevard, Suite 1400
18 Los Angeles, CA 90024
19 Telephone: (310) 474-1582
20 Facsimile: (310) 475-7871
21 pmc@mcnicholaslaw.com

22 Bruce Simon
23 PEARSON, SIMON, WARSHAW & PENNY LLP
24 44 Montgomery Street, Suite 2450
25 San Francisco, CA 94104
26 Telephone: (415) 433-9000
27 Facsimile: (415) 433-9008

28 Jonathan Shub
SHUBLAW LLC
1818 Market Street, 13th Floor
Philadelphia, PA 19106
Telephone: (610) 453-6551
Facsimile: (215) 569-1606
jshub@shublaw.com

David R. Buchanan
SEEGER WEISS LLP
One William Street
New York, NY 10004
Telephone: (212) 584-0700
Facsimile: (212) 584-0799
dbuchanan@seegerweiss.com